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September 18, 2019

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

**Re: In the Matter of Alex Nguyen v. Cellco Partnership
EB Docket No. 16-242; File No. EB-16-MD-003**

Dear Secretary Dortch:

Enclosed for filing please find Verizon's Opposition to the Complainant's Application for Review in the above-referenced proceeding. Complainant's Application seeks review of the August 6, 2019 Memorandum Opinion and Order issued by the Enforcement Bureau in this matter.

Please feel free to contact me with any questions or concerns.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Haga", with a stylized flourish at the end.

David L. Haga

Enclosure: as stated

cc (via email): Rosemary McEnery
Lisa Saks
Michael Engel
Alex Nguyen

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Alex Nguyen

Complainant,

v.

Cellco Partnership d/b/a Verizon Wireless,

Defendant.

Proceeding Number 16-242

Bureau ID Number EB-16-MD-003

VERIZON'S OPPOSITION TO APPLICATION FOR REVIEW

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September 18, 2019

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Cellco Partnership d/b/a Verizon Wireless,

Defendant.

Proceeding Number 16-242

Bureau ID Number EB-16-MD-003

VERIZON’S OPPOSITION TO APPLICATION FOR REVIEW

Alex Nguyen failed in his formal complaint¹ to satisfy his burden of proving by competent evidence that Cellco Partnership d/b/a Verizon Wireless (“Verizon”) violated the Act² or the Commission’s rules or orders. Accordingly, the Enforcement Bureau properly denied the Complaint in its August 6, 2019 Memorandum Opinion and Order (“Order”).³ Mr. Nguyen’s Application for Review of that Order points to no reliable, material evidence that the Bureau overlooked and that could support his claims. To the contrary, the Bureau reviewed the entire record when it denied the complaint, and the Application does not demonstrate error or otherwise set forth any basis for disturbing the Order. The Commission should deny the Application.

¹ See Complaint, Proceeding No. 16-242, Bureau Id. No. EB-16-MD-003 (filed Jul. 26, 2016) (“Complaint”).

² Communications Act of 1934, as amended (the “Act”).

³ *Alex Nguyen v. Cellco Partnership d/b/a Verizon Wireless*, Memorandum Opinion and Order, DA 19674 (Rel. Aug. 6, 2019) (“Order”).

I. INTRODUCTION AND SUMMARY

At the time he filed the complaint, Mr. Nguyen was a Verizon customer. *See* Order at ¶ 5. But very little of what he alleged in his complaint had anything to do with his own personal experience as a customer. The complaint alleged that Verizon violated the C Block rules,⁴ Sections 201(b) and 202(a) of the Act, the *Title II Order* rules,⁵ and a 2012 consent decree⁶ in a variety of ways, including allegedly (1) interfering with customers' ability to use various mobile devices and applications of their choice, (2) interfering with edge providers' ability to make those devices and applications available to customers, (3) disabling applications, features, and functionalities on devices, (4) imposing discriminatory pricing, and (5) failing to provide accurate disclosures. *See* Order at ¶¶ 6-7 (citing Complaint); Application at 1.

With limited exception, Mr. Nguyen was not involved in and did not have first-hand knowledge of the facts he alleged in his complaint. Nor did he accompany his complaint with supporting affidavits or declarations from witnesses who actually did have personal knowledge of the relevant facts. *See, e.g.*, Order at ¶¶ 1, 6, 12. Instead, the complaint rested almost entirely on various unsworn items Mr. Nguyen had read online. *Id.* at ¶¶ 1, 11, 12. The various Internet posts cited in the complaint were authored by third parties – in many cases, anonymously – and some of the posts even conceded that the author was speculating or expressing opinion, rather than stating fact. *Id.* at ¶ 11.

Verizon answered the complaint, providing supporting declarations from persons with first-hand knowledge of the relevant facts and other verifiable evidence and legal analysis

⁴ 47 CFR § 27.16.

⁵ 47 CFR §§ 8.3, 8.5, 8.11 (2016).

⁶ *Cellco P'ship d/b/a Verizon Wireless*, Order and Consent Decree, 27 FCC Rcd. 8934 (Enforcement Bureau 2012).

refuting Mr. Nguyen’s factual assertions and claims. *See id.* at ¶ 16 (noting that Verizon submitted, *inter alia*, seven sworn declarations from Verizon employees with knowledge of the relevant facts).⁷ Mr. Nguyen submitted a “Reply,” but that again relied almost entirely on unverified information from Internet blogs, webpages, and articles. *Id.* at ¶ 11.⁸ The parties requested and exchanged discovery, after which Mr. Nguyen agreed that further briefing was not necessary. *Id.* at ¶ 7 n.23.

On August 6, 2019, the Enforcement Bureau denied the complaint in its entirety. The Bureau recognized that “[a] complainant has the burden in a formal complaint proceeding ... to demonstrate by a preponderance of the evidence that the alleged conduct occurred and that it violated the Act or a Commission rule or order.” *Id.* at ¶ 9 (citations omitted). The Order found that the various hearsay statements in unsworn and unverified Internet postings Mr. Nguyen cited in his complaint did not constitute reliable evidence sufficient to support the factual allegations for any of the alleged violations. *Id.* at ¶ 11. And, after otherwise “[r]eviewing the entire record,” the Bureau concluded that “Nguyen failed to meet [his] burden by providing reliable evidence in support of the violations alleged in the Complaint.” *Id.* at ¶ 9.

Mr. Nguyen now seeks review of certain, specific aspects of the Order. The Application for Review does not appear to dispute the Order’s conclusion that the unsworn and unverified online information cited in the complaint did not constitute reliable evidence for purposes of a formal complaint proceeding. *Id.* at ¶ 11.⁹ Instead, the Application contends that review is

⁷ Answer of Cellco Partnership d/b/a Verizon Wireless, Proceeding No. 16-242, Bureau Id. No. EB-16-MD-003 (filed Sept. 22, 2016) (“Answer”).

⁸ Reply and Legal Analysis, Proceeding No. 16-242, Bureau Id. No. EB-16-MD-003 (filed Nov. 1, 2016) (“Reply”).

⁹ *See also* Order at n. 33 (concluding that Mr. Nguyen could not satisfy his burden under 47 CFR § 1.720(c) to support the factual assertions in his complaint with “relevant documentation

warranted because “[t]he Order intentionally or unintentionally overlooks material evidence and believes false claims over verifiable facts.” Application at 1, 2, 18.¹⁰ By that, Mr. Nguyen is arguing two things: (1) he submitted additional probative material (beyond the unverified third-party Internet postings found to be unreliable) that he believes the Bureau failed to adequately consider; and (2) the Bureau should have given more weight to that additional material than to the contrary evidence Verizon provided because factual allegations that support his claims are “verifiable facts,” whereas any contrary factual assertions by Verizon that refute his claims are “false claims,” even if they are sworn, verified, or otherwise supported. The Application then delves into six specific instances in which Mr. Nguyen contends this type of error occurred.

But Mr. Nguyen is wrong.

Out of the hundreds of pages of exhibits Mr. Nguyen attached to his complaint and reply, the Application identifies only a handful of instances in which he claims to have provided “first-hand evidence” beyond the online material the Bureau deemed unreliable. Given the extent to which Mr. Nguyen based his factual allegations and claims on unverified third party web posts, it would not have been error for the Bureau to deny the Complaint on that basis, regardless of

or affidavit” merely by reference to “hearsay assertions contained in blogs and news articles”) (citing *Applications of CBS, INC. (WCAU-TV), Philadelphia, PA for Renewal of Broadcast License; First Delaware Valley Citizens Television, Inc., Philadelphia, PA for Construction Permit for New Television Broadcast Station*, Memorandum Opinion and Order, 49 FCC Rcd. 743, 744 (1974) (holding that newspaper articles containing hearsay information do not constitute sufficient documentation to support factual assertions)).

¹⁰ In addition to insinuating that the Bureau may have “intentionally” disregarded relevant information (Application at 1, 4, 9, 18), the Application makes several *ad hominem* attacks on the Bureau – accusing the Bureau of issuing findings that are “absurd and patently false.” *Id.* at 4, 8. See also *id.* at 12 (alleging – incorrectly – that “the Order falsely claims” the complaint relied exclusively on “secondary sources”). The Application also repeatedly and without basis accuses Verizon of making false claims. See, e.g., *id.* at 6, 10, 11, 14, 15, 16. Even recognizing that Mr. Nguyen is proceeding *pro se*, these sorts of baseless accusations that another party or the Enforcement Bureau is making false statements or engaging in other wrongdoing are improper.

whether Mr. Nguyen also happened to include citations to the relatively small number of allegedly more reliable sources he now highlights in the Application.

But the Bureau did not limit its review to just the unreliable online material or otherwise overlook any material evidence. The Order was issued expressly after “[r]eviewing the entire record here,” Order at ¶ 9, which included all of the information now highlighted in the Application. That information was not and is not sufficient to demonstrate any violation by Verizon.

The information highlighted in the Application still is not reliable “first-hand” evidence. It still does not include sworn affidavits by people with relevant knowledge or business records that support what is alleged here. Some of the “first-hand evidence” the Application now points to still is unsworn and unverified third-party information Mr. Nguyen found on the Internet (*see, e.g.*, Application at 14 (citing articles on the National Association of Broadcasters website)) or sworn statements made by third parties in other, unrelated proceedings (*see, e.g., id.* at 12 and n.37) or unrelated statements made by Verizon in other contexts for other purposes. *See, e.g., id.* at 7-8 (referring to statements contained in Securities and Exchange Commission filings and a quarterly earnings call).

Even if it were reliable, that “evidence” is of little value. The Application continues to cite to the same sorts of online “secondary sources” that the Bureau already deemed unreliable precisely because Mr. Nguyen’s alleged “first-hand” sources are insufficient to explain – much less support – his allegations on their own. *See, e.g.*, Application at 6-7 (citing online articles and web posts from *The Verge*), at 10 (citing “Droid Life” blog), at 12 (citing online post from “Android Police”).

Because the Application does not point to any reliable, material evidence that was overlooked by the Bureau and that is sufficient to support Mr. Nguyen’s claims, the Commission should deny the Application and affirm the Order.

II. ARGUMENT

For the reasons set forth below, none of the arguments set forth in the Application provides a sufficient basis to review or otherwise disturb the Order.¹¹

A. The Order Properly Denied Mr. Nguyen’s “Pricing and Accounting” Claims Based on His Failure to Provide Reliable Supporting Evidence.

The Application contends that the Order wrongly denied Mr. Nguyen’s claims with respect to “Verizon’s pricing and accounting”¹² on two grounds – both of which relate to whether he provided sufficient evidence to support his claims and both of which misstate the Order, the facts, and/or the governing law.

1. Section 208 Does Not Relieve Mr. Nguyen of His Burden to Prove that a Violation Occurred.

Citing to 47 U.S.C. § 208, the Application begins from the premise that “evidence (first-hand or otherwise) of direct damage to the complainant is not a condition precedent to finding that Verizon violated the Communications Act or the Commission’s rules.” Application at 4. Apparently, this is Mr. Nguyen’s threshold attempt to excuse his failure to provide sworn affidavits from persons with knowledge of the relevant facts or other first-hand information in

¹¹ Mr. Nguyen does not appear to challenge the Order’s denial of any claims other than those reflected in the six specific sections of the Argument section of the Application and addressed below.

¹² The Application indicates that these equate to the claims that Verizon violated the C Block rules and its transparency obligations under the Act by allegedly imposing activation fees, monthly access charges, and discounts on a discriminatory basis. Application at 3. These claims appear to correspond to Count Two in the complaint. See Complaint at ¶¶ 156-74.

support of his allegations. *See* Order at ¶ 12 and n. 33; 47 CFR § 1.720(c). But Section 208 does not relieve a complainant of his duty to demonstrate that an alleged violation occurred.

Even if Mr. Nguyen need not prove that he personally suffered direct damage as a result of the allegedly unlawful conduct in order for the Bureau to find a violation, he still had to prove that (i) the alleged conduct occurred and (ii) that it was unlawful. *See* Order at ¶ 9 n. 27 (citing *Directel, Inc. v. American Telephone and Telegraph Co.*, Memorandum Opinion and Order, 11 FCC Rcd. 7554, 7560-61 (1996); *Consumer.net, LLC v. Verizon Communications, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd. 2737, 2740 (Enforcement Bureau 2010) (“It is well-established that the Complainant has the burden of proof in a formal complaint proceeding [t]hus, to prevail, a Complainant must demonstrate by a preponderance of the evidence that the alleged violation of the Act or the Commission’s rules actually occurred.”); *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, 5713 (2015)). Section 208 therefore does not excuse Mr. Nguyen’s failure to provide reliable evidence demonstrating that Verizon violated the Act or a Commission rule.

Likewise, even if Section 208 meant that a Complainant did not have to prove he suffered direct damages in order for the Bureau to find that a violation occurred, if – as is the case here – the complainant *seeks damages* for the alleged violation, then he still must demonstrate that he suffered such damages. *See, e.g.*, Order at ¶ 17 n.57; *All American Tel. Co. FCC*, 867 F.3d 81, 91-92 (DC Cir. 2017) (finding that a complainant seeking damages in an FCC proceeding bears “the burden of showing both a violation of the law and ‘actual damages suffered as a consequence of such violation’”). That is why the Application is mistaken in suggesting that the Order ran afoul of Section 208 by noting that “Nguyen failed to provide reliable evidence

showing that ... incorrect information on Verizon’s FAQ page caused him to suffer damages.” Application at 4 n.6 (quoting Order at ¶ 17).

While Mr. Nguyen first raises this issue in the section of the Application addressing “pricing” claims (Application at 4), the statement from the Order that he cites was made with respect to just one of Mr. Nguyen’s other claims – that Verizon violated former Rule 8.3 by inaccurately stating certain device compatibility information on its website. *See* Order at ¶ 17. *See also* Section II.F, *infra*. And that statement came after the Order’s detailed explanation as to why Mr. Nguyen failed to demonstrate that a violation of former rule 8.3 had occurred. *Id.* Only then did the Bureau add that Mr. Nguyen also had failed to demonstrate that he had suffered any resulting damages – and only because Mr. Nguyen had sought damages for that alleged violation. *See id.* at n.57 (citing Complaint at ¶ 271). Thus, contrary to the Application’s suggestion, the Order did **not** dismiss Mr. Nguyen’s complaint with respect to this particular claim because of the absence of direct damage to the complainant. The Order denied Mr. Nguyen’s claim that a violation had occurred because he failed to demonstrate that a violation had occurred (*id.* at ¶ 17), and further denied his claim for damages related to that alleged violation because he did not demonstrate that he had suffered any such damages. *Id.* at ¶ 17 and n.57. Neither decision runs afoul of Section 208.

2. The Bureau Did Not Overlook Material Evidence, But Reviewed the Entire Record and Properly Concluded that Mr. Nguyen Had Failed to Support His Claims with Sufficient Evidence.

The Application next contests the Order’s finding that Mr. Nguyen failed to provide sufficient evidence to support his claims with “first-hand, reliable evidence about the pricing plans Verizon offered to customers.” Application at 4. Again, the Application does not dispute the Order’s conclusion that unverified information contained in Internet blogs, webpages, and

articles “does not constitute reliable evidence sufficient to support the factual assertions for any of the alleged violations.” Order at ¶ 11.¹³ Rather, the Application’s central argument is that Mr. Nguyen submitted additional information beyond just those unreliable online sources, and the Bureau failed to consider it. *See* Application at 3-4. The Application first addresses this issue generally, and then specifically with respect to Nguyen’s “pricing and accounting claims.” *Id.*

Mr. Nguyen concedes that, in general, the complaint was supported with “secondary sources” (*i.e.*, the unverified third party blogs, Internet posts, and articles). *Id.* at 3. But he insists that “I didn’t *exclusively* rely on secondary sources, as the Order falsely claims.” *Id.* at 3-4 (emphasis added). However, the Order does not make any such claim.

To be sure, the Bureau recognized that – as a general matter – the allegations in the complaint were based “almost entirely” on unverified information from online sources. Order at ¶ 11. But the Bureau never stated that Mr. Nguyen had relied “exclusively” on such material. Nor did the Bureau review only such material in reaching its decision. To the contrary, the Bureau expressly “[r]eviewed the entire record here,” which included the additional limited material Mr. Nguyen submitted beyond the unverified blogs and Internet posts. *Id.* at ¶ 9. And after reviewing that entire record, the Bureau did not find any reliable evidence sufficient to establish any violation of the Act or any Commission order or rule. *Id.*¹⁴

¹³ Although the Application does not appear to dispute the Order’s finding that such unverified material does not constitute reliable evidence sufficient to support a formal complaint under § 208, Mr. Nguyen nevertheless continues to introduce and rely upon unverified third-party “secondary sources” throughout the Application. *See, e.g.*, Application at 6-7, 10, 12, 16.

¹⁴ For example, the Bureau examined the additional information Mr. Nguyen provided in his interrogatory responses (even though they were unsworn) that purportedly related to his use of devices on Verizon’s network, only to conclude that those responses “provide very little information about his actual experience using or attempting to use these devices” Order at n. 37. The Bureau also considered “the few documents he submitted with his responses,” but

Undeterred, the Application insists review is warranted because the Order failed to recognize that Mr. Nguyen had submitted a few pieces of “first-hand” information specifically in support of his claims about “Verizon’s pricing and accounting” – *i.e.*, the claims that Verizon violated the C Block rules and its transparency obligations under the Act by allegedly imposing activation fees, monthly access charges, and discounts on a discriminatory basis. Application at 3. In particular, Mr. Nguyen takes issue with the Order’s conclusion that he “offers no reliable, first-hand evidence about the pricing plans Verizon offered to customers during the period at issue” in support of these claims. Order at ¶ 13. He asserts that conclusion is “absurd and patently false” because he submitted copies of his Verizon bills and certain excerpts from Verizon’s website that constitute “first-hand evidence” supporting these particular claims. Application at 4-6. Mr. Nguyen also references additional “secondary sources” – *i.e.*, third-party articles he found online – to “support my assertions” (*id.* at 6), as well as a Wireless Telecommunications Bureau competition report and certain Securities and Exchange Commission filings and investor statements. *Id.* at 7-8. But that Mr. Nguyen may have submitted these materials does not render the Order’s conclusion regarding these claims “absurd and patently false.”

As an initial matter, these materials do not include sworn affidavits from persons with first-hand knowledge of the relevant facts. That typically would be the sort of “reliable, first-hand” evidence that the Bureau would find necessary to support a complaint. *See, e.g.*, Order at ¶ 13; 47 CFR § 1.720(c). And the Order did not state that Mr. Nguyen had failed to cite *any* additional material regarding these particular claims beyond the cited “secondary sources.”

concluded those documents “provided no useful detail.” *Id.* And the Bureau reviewed the screenshot Mr. Nguyen provided of his Verizon account, only to conclude that it did not constitute reliable evidence supporting his claims. *Id.*

Rather, the Order stated that Nguyen failed to provide “verified” evidence that “supports Nguyen’s allegation that Verizon engaged in discriminatory pricing.” Order at ¶ 13. In other words, the Bureau was not asserting that Nguyen failed to submit anything more (beyond the “secondary sources”) or that the Bureau failed to consider what was submitted; rather, the Bureau looked at what Nguyen provided and decided that it did not reliably support his allegations. *Id.*

Indeed, the alleged “first-hand” materials cited in the Application (and Mr. Nguyen’s explanation of them) do not contain enough information to demonstrate that Verizon engaged in discriminatory pricing or otherwise violated the C Block rules or the Act. *See* Order at ¶ 13. Those materials include copies of Mr. Nguyen’s own Verizon bills, certain pricing disclosures from Verizon’s website, and certain statements made in SEC filings and on an investor call. *See* Application at 4-5, 7-8. But those bills only show what Mr. Nguyen was charged at certain points in time; they do not show what others were charged or why – much less that any pricing to Mr. Nguyen or any other customer was discriminatory. In fact, Verizon explained why its pricing was *not* discriminatory and supported that answer with a sworn declaration from someone with first-hand knowledge of that pricing. *See* Answer at ¶¶ 59-69; Declaration of Louis F. Ambio. The pricing disclosures on Verizon’s website cited in the Application support that explanation (even if Mr. Nguyen misstates or misunderstands them). *See* Application at 5-6. And Mr. Nguyen does not explain how the generalized statements Verizon made in the cited SEC filing and investor call about “subsidies” are tied to his specific allegations here of

discriminatory pricing with respect to customers who brought their own devices. *Id.* at 7-8.¹⁵ In truth, they do not. *See Answer* at ¶¶ 59-69.

Even without taking Verizon’s verifiable supporting evidence into account,¹⁶ the allegedly “first-hand” materials cited in the Application do not contain sufficient reliable evidence on their own to call into question the Bureau’s conclusion that “Nguyen provides no reliable evidence that Verizon’s waiver of fees for customers financing devices through Verizon ultimately resulted in Verizon charging discriminatory fee amounts over the course of any financing arrangement.” Order at ¶ 13. Among other things, Mr. Nguyen failed to show that the net price Verizon charged customers financing their devices through Verizon was any more favorable than the price Verizon charged customers who brought their own devices. *Id.*¹⁷

B. The Order Properly Concluded that Mr. Nguyen Failed to Set Forth a *Prima Facie* Case for a Violation of the C Block Rules.

The complaint alleged that Verizon violated the C Block rules by, *inter alia*, interfering with customers’ ability to use the devices of their choice on Verizon’s network. *See Complaint* at ¶¶ 37-58. The C Block rules provide that, “[o]nce a complainant sets forth a *prima facie* case that the C Block licensee has refused to attach a device or application in violation of the requirements adopted in this section, the licensee shall have the burden of proof to demonstrate that it has adopted reasonable network standards and reasonably applied those standards in the complainant’s case.” 47 CFR § 27.16(f). The Order found that, because “Nguyen failed to

¹⁵ The same is true of the statements contained in the Wireless Telecommunications Bureau competition report cited in the Application (at 7).

¹⁶ *See Order* at n. 43.

¹⁷ While the Order does not specifically mention the Verizon bills and website information referenced in the Application in deciding these particular claims, the Order did specifically refer to the screenshot Mr. Nguyen provided of his Verizon account (Order at n.37) and expressly stated that the Bureau had “[r]eviewed the entire record here” in reaching its decision. *Id.* at ¶ 9.

provide evidence establishing [such] a *prima facie* case that Verizon refused to attach a device or application in violation of the requirements [of] Section 27.16, the burden never shifted to Verizon to demonstrate that it adopted reasonable network standards and reasonably applied those standards in the Nguyen’s case.” Order at ¶ 9 n.27.

Mr. Nguyen now claims the Bureau erred in finding that he “didn’t set forth a *prima facie* case that Verizon was not transparent about its ‘certification’ process [for devices] and exploited the lack of transparency.” Application at 9. But the Application does not provide any basis to conclude that finding was in error. The Application merely states – in conclusory fashion – that “this application for review and my earlier filings make clear [that] I set forth a *prima facie* case” *Id.* However, the Application does not specify how those earlier filings or some other portion of the Application makes that clear.

Instead, the Application provides “just one example for this section” explaining why Mr. Nguyen believes he previously set forth a *prima facie* case for a violation of the C Block rules. *Id.* Specifically, Mr. Nguyen repeats his allegations that Verizon refused to permit him to attach a Nexus 6 device to its network in 2015. *Id.* at 9-11. *See* Complaint at ¶¶ 52-54. But the Order already specifically examined the allegations regarding the Nexus 6 device – and rejected them. *See* Order at ¶ 12 and n. 40. The Application offers nothing new to justify reviewing that decision.

Indeed, just as before, Mr. Nguyen continues to rely on unverified third party blogs and online articles to support his claims regarding the Nexus 6. *Id.* at n. 40; Application at 10. The Bureau properly concluded that those sources did not constitute reliable evidence. *See, e.g.,* Order at ¶ 11. And this particular issue illustrates why. Mr. Nguyen has no first-hand knowledge of what transpired with respect to the certification process for the Nexus 6. *See id.* at

n.40. He was not involved in the certification process or any discussions or communications between Verizon and Google, nor has he provided any reliable first-hand evidence from Verizon, Google, or anyone else who was. *Id.* His continuing speculation in the Application about this device and what happened with respect to its certification is insufficiently supported and mistaken. And it does not outweigh the sworn probative evidence that Verizon provided from the people who did have first-hand knowledge of the relevant facts and who explained what occurred and why it did not amount to a violation of the C Block rules. *Id.* See also Answer at ¶¶ 52, 54; Declaration of Vijay Paulrajan at ¶ 15. Or, stated differently, “even if Nguyen had satisfied his initial burden to establish a *prima facie* case, he has failed to rebut the evidence that Verizon submitted in its defense.” Order at n.27. The Application therefore provides no basis on which to review this portion of the Order.

C. The Application Does Not Provide Any Basis to Review the Bureau’s Decision Denying Mr. Nguyen’s Claims Relating to Tethering.

The Application next contends that the Order wrongly denied Mr. Nguyen’s claims relating to tethering. See Application at 11-14. The Application starts by misstating Verizon’s responses to Mr. Nguyen’s tethering allegations. Compare Application at 11 with Answer at ¶¶ 15, 82, 203-14. Then the Application repeats Mr. Nguyen’s prior arguments on this issue, referencing unverified “secondary sources” in support. Application at 11. The Bureau already rejected those arguments, noting that the only support provided in the complaint for Mr. Nguyen’s tethering claim was a 2011 “article posted on a website.” Order at ¶ 15. See also *id.* at n.47. As the Order properly concluded, “Nguyen provide[d] no direct and verified evidence for his allegation that Verizon compels device providers to alter built-in tethering features” *Id.* at ¶ 15.

In the Application, Mr. Nguyen again asserts that “I didn’t exclusively rely on secondary sources, as the Order falsely claims.” Application at 12. He cites to “a sworn declaration” (*id.*); but that sworn declaration was not cited in the tethering allegations of the complaint and was not prepared in connection with this proceeding; it was submitted in another, unrelated case between third parties. *Id.* at 12, n. 37. Mr. Nguyen has not provided any sworn declaration prepared in connection with this proceeding. Order at ¶ 12.

Mr. Nguyen also claims he cited “the primary and authoritative source of information about the Android operating system: Google’s source code repository.” Application at 12. The Application then delves into a lengthy discussion regarding the currently available version of Google source code for the Android operating system – apparently in an attempt to support Mr. Nguyen’s assertions regarding Verizon’s alleged disabling of tethering several years ago. *See* Application at 12-14. The complaint did not cite this source code or make this argument.¹⁸ And the Application does not explain why the Commission should consider the source code accessed “[a]t the time of writing” the Application (*id.* at 12) in connection with a complaint submitted more than three years ago.

Moreover, while the Application suggests its discussion of current source code shows that “tethering is a feature” (*id.* at 13) and that the source code “allow[s] carriers to disable tethering” (*id.* at 12), those alleged factual conclusions are not clear from the discussion.¹⁹ Nor would they prove Mr. Nguyen’s tethering claim. Even if the Commission were to consider this “evidence” now, it still does not establish the ultimate fact here – *i.e.*, whether Verizon disabled

¹⁸ The Application (at 13) states that Mr. Nguyen previously made a reference to a prior version of the source code repository in his reply.

¹⁹ Without the help of a supporting declaration or testimony from Google or an established expert, the Application’s discussion of this source code is neither comprehensible nor probative.

tethering. The Complaint did not contain and the Application does not point to any verified or reliable evidence that Verizon did so. *See* Order at ¶ 15. In fact, the only sworn, verified evidence in the record established just the opposite: “Verizon does not disable any tethering feature or functionality, nor does it block customers from using any third-party tethering applications that are available and work on their particular devices.” Declaration of Samir Vaidya at ¶ 4. *See also* Answer at ¶ 82. The Application does not rebut this dispositive evidence.

D. The Order Properly Denied Claims that Verizon Disabled FM Radio Capability.

The Application appears to misunderstand the Order’s denial of Mr. Nguyen’s claim that Verizon disabled FM radio capability in devices. The Order found that:

Nguyen’s allegation that Verizon compelled handset suppliers to disable chips for receiving FM radio broadcast signals in devices that Verizon sells is unsupported by any testimony or business records from a device supplier or anyone else with direct knowledge of Verizon’s interactions with handset suppliers. Instead, Nguyen supports this claim almost entirely by citation to material on the websites of third parties that are not device suppliers.

Order at ¶ 15 (citations omitted).

In seeking review of that finding, the Application again asserts that “the Order’s claim that I didn’t rebut Verizon’s false claims with first-hand evidence or reliable evidence is false.” Application at 14. But the “first-hand evidence” the Application suggests the Order failed to take into account is not “first-hand evidence.” *Id.* at 14-15. It is the same unsworn and unverified information from unrelated third parties that Mr. Nguyen found online and cited in his complaint – and that the Bureau rightly deemed unreliable. *Id.*

Because Mr. Nguyen alleged that “Verizon compelled handset suppliers to *disable* FM radio chips” (Complaint at ¶ 70 (emphasis in original)), the Bureau expected Mr. Nguyen to provide first-hand evidence from those handset suppliers or Verizon (or someone else with demonstrated direct knowledge of the interactions between handset suppliers and Verizon) that would substantiate his claim. Order at ¶ 15. He did not. Instead, Mr. Nguyen provided articles from the websites of the National Association of Broadcasters (not handset suppliers) and NextRadio (which is an application provider, not a handset supplier). *See* Application at 14-15.

The Application insists that information from those sources constitutes “first-hand evidence or reliable evidence” of what Verizon compelled device manufacturers to do. But the information cited from those websites is neither in the form of sworn affidavits nor business records. It is not sourced from the only parties that presumptively would have knowledge of what Verizon did or did not compel the handset suppliers to do – *i.e.*, Verizon and the handset suppliers.²⁰ And there has been no foundation laid that the authors of these posts on the National Association of Broadcasters or NextRadio websites would have any first-hand knowledge of the interactions between Verizon and the handset suppliers.²¹ As such, the Bureau properly

²⁰ The Application also claims that Mr. Nguyen “averred” in interrogatory responses that FM radio features stopped working on his personal device after “Verizon pushed a software update that made the features stop working.” Application at 14. But those (unsworn) interrogatories do not say that. The cited interrogatory responses only say (in entirely conclusory fashion) that, “I used an HTC One M8 and One M9 on the Verizon Wireless network in April 2016 and confirmed Verizon blocked FM radio capabilities built into its devices.” Reply to Defendant’s First Set of Interrogatories (Mar. 10, 2017) at 3. The interrogatory responses do not explain how Mr. Nguyen allegedly “confirmed” that “Verizon blocked FM radio capabilities.” Nor do they provide enough detail to understand whether and why the FM radio capability on his particular device might have stopped working at that time, whether or when the FM radio capability resumed, or whether that was the result of any action or direction by Verizon to cause that particular effect.

²¹ The Application argues that the Order erred in considering a handset supplier to be a reliable source, but not an application provider like NextRadio. *See* Application at 14. But a handset supplier that was involved in the alleged interactions with Verizon is differently situated than a

concluded that the cited websites did not contain reliable evidence sufficient to sustain Mr. Nguyen's claims regarding FM radio capability.²²

E. The Application Does Not Provide Any Basis for Reviewing the Order's Denial of Claims regarding Samsung Pay or Apple iPhone 5c and 5s Devices.

While briefly mentioned in the Application, Mr. Nguyen does not seriously contest the Order's denial of his claims that Verizon violated the C Block rules by allegedly "blocking" Samsung from making Samsung Pay available as a preloaded and/or downloaded app on Verizon phones. *See* Application at 16; Complaint at ¶¶ 98-113. The Application only spends one sentence on this issue, and then only argues that the complaint "set forth a *prima facie* case" because it cited "reliable sources" suggesting that Verizon had an economic incentive to block Samsung Pay and Samsung's website, which stated that "Samsung intended to preload Samsung Pay on Samsung devices." Application at 16.

However, the "reliable sources" cited in the Application in fact were just one unreliable source: a web post on "recode.net" – precisely the type of unverified third party Internet blog that, as discussed above, the Order properly deemed insufficient to support factual assertions in a

third party application provider that was not, such that sworn statements or business records from that handset supplier would carry probative value that an unsworn website article from the application provide would not. While the Application asserts that NextRadio "directly worked with device suppliers" (*id.*), that assertion is unsupported. And, in any event, the cited material from NextRadio is an unverified webpage – not a sworn affidavit or business record that could be relied upon here.

²² By contrast, a Verizon employee with first-hand knowledge of this issue submitted a sworn declaration establishing that Verizon neither requires nor prevents the inclusion of FM radio capability in handset suppliers' devices, and that Verizon did not disable or compel suppliers to disable FM radio capability in the devices identified in the complaint. *See* Declaration of Vijay Paulrajan, ¶ 16; Answer, ¶¶ 70-78. In fact, Verizon sells several devices that have FM radio capability. *Id.*

formal complaint proceeding. *See* Application at 16 n.47; Order at ¶ 11.²³ Likewise, the post on Samsung’s website cited in the Application merely expressed what Samsung “intended” at a given point in time. Application at 16. It did not establish that Verizon undertook any action or that such action violated the C Block rules (or any other statute or Commission rule).

Mr. Nguyen did not come close to establishing a *prima facie* case that Verizon violated the C Block rules with respect to his allegations regarding Samsung Pay. But, even if he had, Verizon produced sworn evidence refuting that claim and conclusively establishing that no violation occurred. *See* Declaration of Anthony Dennis at ¶ 7; Answer at ¶¶ 98-113.

Similarly, the Application only makes a cursory, one paragraph effort to find fault with the denial of Mr. Nguyen’s claims regarding Verizon’s statements about the compatibility of Apple iPhone 5c and 5s devices. *See* Application at 16-17. The Application contends that Verizon wrongly stated on its website that third party Apple iPhone 5c and 5s devices could not be used on the Verizon network, basing this contention on a September 2013 post on Apple’s website that suggested otherwise. *Id.* But, to the extent that September 2013 post on Apple’s website suggested as much, it was inaccurate – and Verizon provided sworn evidence confirming as much.

As Verizon explained in its Answer and an accompanying declarations, the iPhone 5s and earlier generations of Apple products used with other carriers could not be used on the Verizon network because they were not the same as the similar models built to work on the Verizon network. *See* Answer at ¶ 55 (citing Apple FAQ document from Verizon website); Declaration of Christopher Schmidt at ¶ 3; Declaration of Vijay Paulrajan at ¶ 5. Those devices did not

²³ The Complaint also cited to various unverified third party online sources in support of this claim. *See, e.g.*, Complaint at ¶¶ 98, 101-105, 107, 109-10.

support the code division multiple access (“CDMA”) interface necessary for use on Verizon’s network. *See* Declaration of Christopher Schmidt at ¶ 3; Order at ¶ 18. The Application does not provide any reliable evidence that rebuts these facts.²⁴ The Order therefore properly denied Mr. Nguyen’s claims regarding these devices. *See* Order at ¶ 18.

F. The Order Properly Denied Mr. Nguyen’s Claims Regarding Verizon’s Website Disclosures.

The Application contends that the Order “erroneously dismissed the misleading, deceptive, and inaccurate information Verizon admitted it disclosed.” Application at 17. While somewhat unclear from the Application, it appears this argument is addressed to the Order’s denial of Mr. Nguyen’s claim that Verizon violated former Rule 8.3 by temporarily inaccurately stating on its website that Apple iPhone 6 and iPhone 6 Plus devices purchased from third parties were not compatible with Verizon’s network. *See* Order at ¶ 17; Complaint at ¶¶ 122-23, 222-26. The Application contends this denial was in error for two reasons.

First, the Application suggests that the Bureau wrongly denied this claim on the basis that Mr. Nguyen failed to provide reliable evidence showing that he was damaged by the incorrect information on Verizon’s website because Section 208 of the Act precludes dismissing a complaint due to the absence of direct damage to the Complainant. *See* Application at 17. That argument was addressed in Section II, A.1, *supra*. As explained there, even if a complainant need not suffer direct damage for the Bureau to find a violation, the complainant still has the

²⁴ In the Application, Mr. Nguyen asserts that “[t]hese averments in my earlier filings were based on first-hand experience. See the sections regarding Samsung and Apple in my earlier filings for more details.” Application at 17. It is unclear what the referenced “averments in my earlier filings” were or what “sections regarding Samsung and Apple” Mr. Nguyen had in mind. But simply (and vaguely) referring back to prior filings is hardly sufficient to support an application for review. And, in any event, the Bureau already considered the entirety of the record – including all earlier filings – in denying Mr. Nguyen’s claims. *See* Order at ¶ 9.

burden of providing evidence that a violation occurred. And notwithstanding Section 208, where (as here) the complainant seeks damages for that violation, the complainant still must prove that he suffered the alleged damages in order to recover them.

In this instance, the Order makes clear that it did not deny this claim for a violation of former Rule 8.3 because of the absence of direct damage to Mr. Nguyen. The Order denied this claim because Mr. Nguyen failed to provide reliable evidence that a violation had occurred (Order at ¶ 17), and then also denied his corresponding claim for damages because he did not provide reliable evidence showing that he suffered any such damages. *Id.* at ¶ 17 and n.57. That is entirely consistent with Section 208.

Second, the Application argues that dismissal of the former Rule 8.3 claim is based on the erroneous premise that Verizon rectified the inaccurate information on its website after a reasonable time. *See* Application at 17-18 (citing Order at ¶ 17). The Application asserts that the inaccurate information regarding the compatibility of iPhone 6 and 6 Plus devices remained on the Verizon website for “at least 158 days” before it was fixed and that amounted to an unreasonable time. Application at 18. While the Bureau could not determine from the record precisely how long the inaccurate information was posted, it did find that (i) Mr. Nguyen advised Verizon by letter of the inaccuracy on the website and (ii) Verizon promptly investigated and corrected its website after Nguyen notified the company of the inaccuracy. Order at ¶ 17. Given Verizon’s prompt attention and correction once it was made aware of the issue, the Bureau found no violation of Rule 8.3. That conclusion was eminently reasonable under the circumstances, and certainly not error warranting review.

III. CONCLUSION

For the reasons set forth above, the Commission should deny the Application and affirm the Order.

Respectfully submitted,

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September 18, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September 2019, the foregoing Opposition to Application for Review was filed electronically using the Commission's electronic filing system and served on the following people in the manner indicated below:

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